

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 - - - - - x  
4 IRVING H. PICARD, TRUSTEE FOR CASE NO. 14-01840-smb  
5 THE LIQUIDATION OF B CHAPTER 11  
6 v. CASE NO. 08-99000-smb  
7 SUSANNE STONE MARSHALL, ET AL  
8 - - - - - x  
9 SECURITIES INVESTOR PROTECTION ADMINISTRATIVE CASE NO.  
10 CORPORATION 08-1789  
11 - - - - - x

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13 U.S. Bankruptcy Court  
14 One Bowling Green  
15 New York, New York  
16  
17 May 7, 2014  
18 10:03 AM  
19

20 B E F O R E :  
21 HON. STUART M. BERNSTEIN  
22 U.S. BANKRUPTCY JUDGE  
23  
24

25 ECRO: MATTHEW

1 HEARING Re Motion for Preliminary Injunction/Memorandum of  
2 Law in Support of Trustees Application for Enforcement of  
3 Permanent Injunction and Automatic Stay (Adv. Pro No. 14-  
4 01840)(related document(s)5808)'

5  
6 HEARING Re Motion to Dismiss Trustee's Complaint as to  
7 Defendants Marshall, Fox, Peshkin and Oasis

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25 Transcribed by: Sheila Orms

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1 P R O C E E D I N G S

2 THE COURT: Be seated. Madoff.

3 (Pause)

4 MR. MURPHY: Good morning, Your Honor, Keith  
5 Murphy, Baker & Hostettler for the trustee, Your Honor.

6 We're here on the trustee's application this  
7 morning --

8 THE COURT: Let me just get the other appearances.

9 MR. SMITH: Of course.

10 MR. STONE: Richard Stone for the Goldman  
11 plaintiffs.

12 MR. SMITH: Peter Smith of Beckler & Poliakoff for  
13 the Fox plaintiffs.

14 THE COURT: Okay. Thank you. Go ahead.

15 MR. MURPHY: Thank you, Your Honor. This morning  
16 we're here on the trustee's application to enforce the  
17 permanent injunction entered by the bankruptcy court on  
18 January 13th, 2011 and the automatic stay in these  
19 proceedings, Your Honor, and to otherwise enjoin the Fox  
20 plaintiffs and the Goldman plaintiffs and anyone acting on  
21 their behalf from proceeding with their punitive class  
22 actions against the Picard defendants or any other actions  
23 against the counter defendants without further leave of this  
24 Court.

25 Last week, Your Honor, we were before you in

1 connection with the Fox plaintiffs' motion to stay. And  
2 during that hearing, the Court asked what interest does the  
3 estate have in this matter, and why shouldn't this go  
4 forward in Florida. And I answered it at that time, I  
5 answered it with respect to what the trustee's interests are  
6 and the estate's interest, as well as we believe this  
7 Court's interests are, but I'd like to just highlight some  
8 of that again.

9 The injunction against duplicative and derivative  
10 claims, Your Honor, was a bargained for element of the  
11 immense settlement that we entered into with Picard. And  
12 that permanent injunction has to have a meaning that's  
13 uniform in order to be -- to have a meaning.

14 The fraudulent transfer claims here that were  
15 settled with the Picard defendants are the estate claims,  
16 but the class action plaintiffs here are seeking to usurp  
17 those claims and to utilize them for themselves.

18 The Court's power, Your Honor, to enjoin  
19 duplicative and derivative claims has to have teeth. The  
20 challenge that's presented here by the class action  
21 plaintiffs complaints effects the ability -- the trustee's  
22 ability to promise finality when the defendants settles  
23 claims with the trustee, and it affects this Court's power  
24 to grant that finality.

25 And it has effects clearly obviously just beyond

1 this case. It has to do with other bankruptcy cases as  
2 well, when a permanent injunction is entered.

3 The other issue is that what claims belong to the  
4 trustee, and what claims belong to other people is clearly  
5 an issue that continues to be a live and litigated issue in  
6 this case, Your Honor. And therefore addressing it here,  
7 protects the integrity of the entire BLMIS liquidation  
8 proceeding before the Court, from the net equity decision to  
9 the claims process to the avoidance and settlement process  
10 to the permanent injunction itself.

11 All of these are integral and essential to these  
12 proceedings. I know that Judge Codel (ph) also had found  
13 that the injunction of derivative claims protects the  
14 integrity of the SIPA proceeding.

15 We can't allow, the Trust can't allow others to  
16 use the estate's claims to get more money from the Picowers  
17 for the benefit of the same customers who are already before  
18 this proceeding and addressed by the trustee's activities,  
19 Your Honor.

20 The net equity decision that was entered here  
21 provided the parameters, Your Honor, they are not entitled  
22 to their fictitious profits. But the class action  
23 plaintiffs in multiple attempts have tried to circumvent or  
24 supplement their recovers beyond the net equity decision by  
25 trying to sue the Picowers.

1           They're essentially trying to create a shadow  
2       estate of all the customers that are represented by the  
3       trustee. For example, the Fox second amended complaint  
4       seeks damages in the approximately amount of \$64.8 billion,  
5       which actually coincides with what the last statements were  
6       in December of 2008.

7           Why do we care, Your Honor? We care because the  
8       customers are usurping the estate's claims here. They're  
9       helping themselves to a separate recovery of claims that  
10      were settled. And absent the estate abandoning those  
11      claims, they remain claims of the estate to bring and to  
12      resolve, and it's inappropriate for others to take those  
13      claims.

14          The Shadow estate is clearly an affront to the  
15      Court's jurisdiction and is appropriate for this Court to  
16      address it. And the other point I would add, Your Honor, is  
17      that a defendant, once they settle with the trustee, should  
18      take comfort in the fact that they're not going to be sued  
19      on the same claims multiple times by the same parties.

20          And furthermore, Your Honor, the fact that these  
21      claims as we see them are duplicative and derivative. Based  
22      on the analysis of the claims, they have not set -- the  
23      class action plaintiffs have not set forth any non-  
24      conclusory particularized and non-derivative claims.

25          THE COURT: Let me ask you a question on that. Am



1 I supposed to decide, for example, whether the complaints  
2 state a claim for control personal liability? In other  
3 words, should I look this as a 12(b)(6) motion?

4 MR. MURPHY: No, Your Honor, you should not look  
5 at it that way.

6 THE COURT: So what am I supposed to decide?

7 MR. MURPHY: We're not asking the Court to look at  
8 this and make determinations as to whether they're  
9 securities claims or not, or whether they've adequately  
10 stated securities claims. What we're asking the Court, is  
11 to review these claims as we have, and determine that once  
12 you look behind the façade, that they are actually  
13 duplicative and derivative of the trustee's fraudulent  
14 conveyance claims.

15 THE COURT: But we know that the same actions can  
16 give rise to direct and derivative claims. So how do I  
17 avoid looking at the complaints to determine whether or not  
18 they've asserted direct claims?

19 MR. MURPHY: I think --

20 THE COURT: Let me give you a for instance, and  
21 I'm not saying these are facts, this is a hypothetical.

22 But suppose the allegation is that Picower induced  
23 Madoff to send Picower's account statements out to everybody  
24 to induce them to either join the fund, or join BLMIS, or to  
25 continue to keep their money there. Those claims would be

1 based upon the withdrawals by Picower. But wouldn't those  
2 also state a claim for securities fraud and maybe aiding and  
3 abetting a securities fraud, maybe a controlled personal  
4 claim?

5 MR. MURPHY: I think, Your Honor, you have to look  
6 at it from the perspective of what's alleged and what facts  
7 are presented in this particular instance.

8 THE COURT: Well, that brings me back to my  
9 question. Am I really looking at these complaints to see if  
10 they allege facts sufficient enough to assert a direct  
11 claim; i.e., a controlled personal claim?

12 MR. MURPHY: No, actually I -- let me come back,  
13 Your Honor.

14 THE COURT: That seems to what be Judge  
15 Sullivan --

16 MR. MURPHY: I was going to say Judge Sullivan  
17 actually addressed this particular issue, and I think he  
18 looked at it from the perspective of saying while it may  
19 look on its face that I'm being asked to decide a 12(b)(6)  
20 issue here, it's actually not. It feels the same, but it's  
21 actually not. There's a different analysis.

22 I'm going -- Judge Sullivan looked at the  
23 statements that were made, even with respect to allegations  
24 that Picower was aware of the fraud, and that he directed  
25 transfers, and that he was involved in making the statements

1 to -- you know, with respect to the accounts.

2 Judge Sullivan examined that and said, even  
3 despite that, I can actually look at this, and I can  
4 determine that these are actually fraudulent conveyance  
5 claims, and they're duplicate and derivative. So he looked  
6 behind it.

7 So I think this Court can do the same thing, and I  
8 think that this Court should do the same thing. There's a  
9 long history here of the bankruptcy court and Judge Sullivan  
10 and Judge Codel and the Second Circuit doing the exact same  
11 thing.

12 I think at first blush, Your Honor, to your point,  
13 you know, we're asking the Court to look at these that  
14 there's really nothing here that's not based on Picower's  
15 withdrawals and the activities on the -- or things that flow  
16 from that.

17 THE COURT: Well, I think one of the complaints,  
18 maybe the Fox complaint says he induced other people to  
19 invest, and somehow he induced or participated with Madoff  
20 in sending the (indiscernible) sell to other investors,  
21 which sounds like a securities fraud claim. Certainly  
22 nobody's arguing that BLMIS committed securities fraud, and  
23 the question is really whether Picower can be liable for  
24 that. And should I look beyond those allegations or --  
25 because those allegations weren't in the complaint I think

1 before Judge Sullivan, were they?

2 MR. MURPHY: No, I think that a large number of  
3 them were, the basis for a lot of these claims were, Your  
4 Honor. I think that there were three categories of claims  
5 that are before you now, most of them were before prior  
6 judges as well. I think that the initial kind of category  
7 is that Picower directed false trades and false  
8 documentation in his own accounts, and they took out large  
9 amounts of money from those accounts.

10 And then if you step down to the next level, is  
11 that as demonstrated by his conduct in his own accounts,  
12 Picower had knowledge of the fraud, and influence and  
13 control over BLMIS.

14 And then you get down to the next level, where we  
15 are now, Your Honor, is that Picower's knowledge, influence  
16 and control over BLMIS amounted to Picower making direct  
17 misrepresentations to class action plaintiffs, and amounted  
18 to an inducement by the Picowers for others to invest, and  
19 to remain invested.

20 I think the first two of those categories, Your  
21 Honor, was what Judge Sullivan saw, and what Judge Codel  
22 saw, and the Second Circuit saw. But there isn't anything  
23 here that's new, that's not based on Picower's activity.  
24 This is what the --

25 THE COURT: Well, of course it's based on

1 Picower's activity, they're seeking to hold Picower liable.

2 MR. MURPHY: Yes, Your Honor, but what the prior  
3 courts have decided is that all of that activity was  
4 relating to Picower's activity in his own accounts. What he  
5 did with his own accounts, how he got the money out, what he  
6 was alleging in his own accounts.

7 The rest of it flowed from there, Your Honor, but  
8 those are inferences that come from Picower's own activity.  
9 And that is what the bankruptcy court, the district courts  
10 in the Second Circuit all rejected, in terms of Picower's  
11 liability. They all said it came back to that. And those  
12 were harms to the estate. And that harm to the estate was  
13 satisfied by the trustee's settlement.

14 THE COURT: Did any of the prior complaints allege  
15 even in conclusory terms that Picower induced whatever  
16 Madoff to send out phony confirmations to other customers?

17 MR. MURPHY: Your Honor, prior complaints said  
18 that -- yes, I believe that they did. I believe that prior  
19 complaints said that Picower had control. Picower  
20 participated fully in the fraud. Picower made statements or  
21 took activity relating to the fraud. I think that is  
22 absolutely in the prior complaints, Your Honor. And I think  
23 though some of those specific allegations are actually  
24 addressed in Judge Codel's and Judge Sullivan's decisions.

25 I think though, Your Honor, if you look at it this

1 way, if you take away the fraudulent transfers, if you take  
2 away activity that Picower did in his own account, with  
3 respect to his own account statements, everything else fits.  
4 All the other allegations fail because there's nothing here  
5 that specifically says that Picower or that establishes  
6 beyond mere conclusory statement.

7 THE COURT: It sounds like you're arguing a  
8 12(b)(6) motion. That's why I asked the question, and let  
9 me give you an example of what's bothering me or confusing  
10 me.

11 I'm looking, I guess, at the Fox complaint, I'm  
12 looking at paragraphs 117 and 118, and they say generally  
13 that Picower induced BLMIS to send misleading statements to  
14 other investors. Am I supposed to look at the sufficiency  
15 of those allegations, or simply say if those allegations are  
16 sufficient, they state a direct claim, I'm not ruling on the  
17 sufficiency of the allegations, that's appropriate for a  
18 12(b)(6) motion in Florida. That's what I'm getting at.

19 MR. MURPHY: Uh-huh.

20 THE COURT: Because I don't know the answer to  
21 that.

22 MR. MURPHY: Okay. Here's what I would say, Your  
23 Honor. I think that looking at this holistically from the  
24 entire history of what's been done here, all the prior  
25 complaints that have been pled, all of the statements and

1       allegations that have been made previously and rejected by  
2       prior judges, what we have here now are mere conclusory  
3       statements that flow, I say, directly from Picower's  
4       activities on account. That was not directed, or any  
5       directed to other customers here. Mr. Picower was a  
6       customer.

7               THE COURT: Well, but they -- but they do allege,  
8       and I know you disagree with the sufficiency --

9               MR. MURPHY: Uh-huh.

10              THE COURT: -- and you may be right, they do  
11       allege that Picower induced BLMIS to send misleading  
12       statements to others, and clearly sending misleading  
13       statements to others would be a direct claim, assuming the  
14       person received the statement and all the other elements of  
15       fraud were present.

16              MR. MURPHY: Right.

17              THE COURT: There's -- and again, it sounds to me  
18       like you're asking me to judge whether or determine whether  
19       that is sufficient to state a direct claim. Since as they  
20       started out saying, we know that a direct claim and a  
21       derivative claim can arise from the same facts, or the same  
22       general facts.

23              MR. MURPHY: I think, Your Honor, after multiple  
24       bites at the apple, the class action plaintiffs haven't come  
25       forward with particularized facts in their new complaints.

1 Your question is, we're not asking you to again judge this  
2 from a 12(b)(6) standard, we're not going to use the posture  
3 of the case, as Judge Sullivan said, to shield the  
4 complaints from your scrutiny.

5 There aren't particularized facts that are alleged  
6 with respect to Mr. Picower's activity vis a vis other  
7 customers in this case. They -- the class action plaintiffs  
8 do utilize specific allegations in certain instances. For  
9 example, they will say, Mr. Picower made a trade on this  
10 date in this amount from this account.

11 But then a follow-up paragraph will be a  
12 conclusion that basically as a result of that, he must have  
13 made some misrepresentation on a global basis to everybody,  
14 and that he somehow intended that.

15 I think, Your Honor, what we're asking the Court  
16 to do is not decide the 12(b)(6) issue, not look at this  
17 from a securities claim issue, but to look at it, to see  
18 what was alleged here, to see how close it is really, in  
19 fact, when you tear away the overlay of what they're saying,  
20 and look at it from the perspective of, this all flows from  
21 Picower's accounts.

22 Again, take out the activity that he did in his  
23 own accounts, there's nothing left. They don't have any  
24 particularized facts.

25 I think that even with respect to the statement



1 that Picower was encouraging other people or inducing other  
2 peoples, that's all based on his knowledge of the fraud and  
3 the activity in his own account. But they use terms like  
4 this amounted to something. But I'll suggest to the Court  
5 that there's no facts that actually back up their  
6 statements.

7 And I think the Court can look at it again,  
8 because the Court is looking at this holistically, this is  
9 not coming from a brand new view. Seventy-five percent of  
10 this was already before prior courts, all the way up to the  
11 Second Circuit. They looked at it, they tore it apart.  
12 While on their face, some statements that Picower controlled  
13 these accounts, that he was absolutely involved in the  
14 fraud, they said that he was -- they allege that he was  
15 involved in the fraud. I'm not sure how much more you need.  
16 But that was found to be insufficient.

17 Judge Sullivan, I'll note, Your Honor, also  
18 questioned how do you figure what is derivative claims here,  
19 and how it applies, it sort of feels like you're accessing  
20 the merits, it feels like it. But as he said, they're  
21 distinct analyses, so that's how I would answer the Court's  
22 point on that, Your Honor.

23 And the derivative claims here, according to the  
24 Second Circuit, are those claims which arise from harm done  
25 to the estate, and they seek relief against third parties

1 that push the debtor into bankruptcy.

2 Again, these points were all examined by the prior  
3 courts, and they found, the Second Circuit found that the  
4 plaintiffs here are trying to plead around the permanent  
5 injunction because they allege nothing more than steps  
6 necessary to affect Picower defendants withdrawals of money  
7 from their accounts, it's their particularized conflict  
8 direct with the BLMIS customers.

9 And by the way, Your Honor, the Goldman plaintiffs  
10 specifically in their prior complaints had identified these  
11 as securities claims, and as controlled personal claims. It  
12 made all those allegations previously, and previously were  
13 rejected.

14 And that when Judge Sullivan looked at them, he  
15 said, when you strip these of their conclusory language, the  
16 only activity alleged is Picower's activities on accounts.  
17 The same is true here, Your Honor, with respect to those,  
18 there's no new facts alleged.

19 We compare the allegations, Your Honor, with the  
20 original complaints with the allegations in the new  
21 complaints in our briefs. And as I said before, the example  
22 I gave you was comparing the specific allegations that they  
23 have, that they have facts are, all relate to Picower's  
24 activities on account versus the conclusory statements that  
25 their activity amounted to something else, that all flows

1 from.

2 But absent any -- there's no allegations here that  
3 Picowers had any contact with any of these customers. And  
4 the only conduct alleged is with his own accounts. And by  
5 the way, Your Honor, there's no relationship here between  
6 Mr. Picower and any of these customers. There's not been  
7 one alleged.

8 The harm that they allege here is the same that's  
9 been suffered by every customer, they're all the same. An  
10 illustration, Your Honor, I'd just like to go through with  
11 you, a comparison of paragraph 69 to 71 of the initial  
12 Goldman complaint, which discusses the false monthly  
13 statements BLMIS sent each other which Judge Sullivan  
14 observed, contained no allegations to Picower's directed or  
15 were at all involved with the creation or dissemination of  
16 these statements to customers.

17 THE COURT: Well, but now there are these  
18 generalized allegations. They're general allegations, which  
19 you say are conclusory, and I may agree, and it sounds to me  
20 like what you're saying is, that even though this isn't a  
21 12(b)(6) motion, I should ignore conclusory allegations and  
22 look at the particular facts that are alleged to determine  
23 whether or not they are direct of derivative claims.

24 MR. MURPHY: Exactly, Your Honor. And even more  
25 so --

1 THE COURT: I'm not sure what the difference  
2 between that and a 12(b)(6) motion is, but go ahead.

3 MR. MURPHY: Even more so, though, Your Honor,  
4 I'll go back to the fact that they've had several bites at  
5 the apple to try to allege this, and as you parse through  
6 what these allegations, you're going to see what the prior  
7 judges have found.

8 Again, they're using, you know, as a consequence,  
9 this happened or that happened, but the new verbiage doesn't  
10 affect that Picower is not alleged to have been directly  
11 involved with the dissemination to any specific customers,  
12 that he did any of this.

13 The -- what they're doing here, Your Honor, is  
14 essentially adding to the chain of inferences that were  
15 there before, that they had asked previous courts also to  
16 make the conclusion. But they don't remedy that flaw, as  
17 Judge Sullivan had found.

18 The Fox plaintiffs' second amended complaint that  
19 they're attempting to file, you know, it doesn't do any  
20 better here, Your Honor, in connection with their initial  
21 complaint, which they effectively parroted the trustee's  
22 complaint.

23 They argued to the Second Circuit that the claims  
24 are independent because their complaints allege that the  
25 Picower's wrongful conduct ensured the fraud success by

1 inducing them and other customers to remain invested and to  
2 invest with BLMIS. The Second Circuit did not buy that,  
3 Your Honor, but the Fox specifically argues it now. They  
4 say that his conduct created -- in his own accounts, caused  
5 the creation of false documentation that induced the Fox  
6 plaintiffs and others to invest.

7 But like the former complaints, Your Honor, and  
8 even the Goldman's new complaint, it merely infers Picower's  
9 control over BLMIS' operation and decision-making, which  
10 resulted in BLMIS picking the false statements upon which  
11 they relied, based on Picower's conduct in his own accounts.

12 Two other points, Your Honor, with respect to the  
13 Fox second amended complaint. I know that some of what they  
14 allege, some of what's new here, I guess, is that they're  
15 saying, according to Madoff. And so according to Madoff,  
16 Picower actively encouraged. But again, if the Court looks  
17 at this, there are no facts, which support an allegation  
18 that Picower actively encouraged any of this.

19 THE COURT: Except Madoff said it supposedly.

20 MR. MURPHY: Except that he said it.

21 THE COURT: Well.

22 MR. MURPHY: And frankly, Your Honor, Mr. Madoff  
23 has been lying for decades.

24 THE COURT: But can I judge that on her motion,  
25 that's a question of proving it.

1 MR. MURPHY: I don't think you have to judge it,  
2 but I don't think you have to give it weight.

3 THE COURT: Let me ask you a different question.  
4 There is a motion pending in the Southern District of  
5 Florida before Judge Marra which raises this same issue.  
6 And putting Fox aside, we dealt with that last week, the  
7 Judge in the Fox matter had his chance, and he decided, he  
8 essentially abstained.

9 But in connection with the Goldman matter, there's  
10 a pending motion which was made before I guess you made the  
11 current or you filed the current complaint. Isn't it  
12 appropriate for Judge Marra in the first instance to  
13 entertain that. And then if he decides that he'll defer to  
14 me to do so?

15 MR. MURPHY: I don't -- for once, Your Honor, I'll  
16 start off with, I don't think this Court needs to wait. I  
17 don't think that it should, I don't think its required to.

18 Judge Weiscamp, as you pointed out did defer.  
19 Judge Marra has had these papers for quite a long time now.  
20 He's aware of what's going on here. He has not taken any  
21 action with respect to it whatsoever.

22 I would -- as I mentioned in my argument last  
23 week, I think that this Court is the first court that we  
24 need to go for questions as to whether something is  
25 duplicative and derivative, or if somebody's trying to usurp

1 the estate's claims, whether settled or not.

2 That's a question for this Court, and I don't  
3 think that that responsibility or that opportunity was  
4 handed off to anybody whether through the Second Circuit  
5 decision or by, you know, a potential activity down in the  
6 Florida courts.

7 But again, Your Honor, I say that's -- at this  
8 point, nothing's gone forward. There's been nothing  
9 substantive that has actually taken place. It's all been  
10 procedural, and the best insight we have is that Judge  
11 Weiscamp deferred to Your Honor.

12 THE COURT: Okay.

13 MR. MURPHY: And I'll note, Your Honor, you know,  
14 even as to that Eleventh Circuit appeal, we have no guidance  
15 even today.

16 THE COURT: Okay.

17 MR. MURPHY: The -- I'll also add, Your Honor, the  
18 sufficiency of what we have before you, what you have before  
19 you is relevant only insofar as it affects whether the  
20 claims are direct. And I think that's what the Court has  
21 the possibility and the option to look at.

22 The -- going back to the Fox second amended  
23 complaint, Your Honor, as previously I guess observed by the  
24 Second Circuit, Fox second amended complaint here now if you  
25 look at it again, it fails to allege quote, for instance

1 that the Picower defendants made any misrepresentations to  
2 the appellants or any other customers. The --

3 THE COURT: I don't think they're accusing Picower  
4 of a primary violation. That's not their argument. Their  
5 argument is essentially that he aided and abetted Madoff.

6 MR. MURPHY: Right. The primary -- obviously the  
7 person would be Madoff. But again, you're going to have the  
8 opportunity to look behind the curtain to look at these  
9 claims and to see whether they allege direct claims or not,  
10 or really whether they're duplicative or derivative. I  
11 think that's really the test, and that's really what Judge  
12 Sullivan considered himself. And I think this Court also  
13 has that opportunity.

14 I -- with respect to the statements as to what Mr.  
15 Madoff said, Your Honor, none of those have any  
16 particularity at all. There's no specificity really about  
17 what was said, what was made, what backs up this statement.  
18 But they appear, Your Honor, to be drawn from a book by  
19 Diana Henriques and maybe some other public media  
20 statements, but there's nothing in there that we see that  
21 has any specific facts.

22 And I note, Your Honor, these plaintiffs are  
23 before you. And I think they collectively represent  
24 hundreds of customers. They've had years to come up with  
25 what they're going to come up with. They're still relying



1 on something that they've either taken from a newspaper or a  
2 book, or according to Madoff, but I'll note not -- there's  
3 no allegations in these complaints that any of their clients  
4 were made misrepresentations to, or that any of their  
5 clients got something from Mr. Picower or relied on  
6 something Mr. Picower did.

7 I would just want to add in, Your Honor, that the  
8 -- their reliance on Metzger v Feingold (ph) is unavailing.  
9 Because in Metzger, at least in that case, the defendants  
10 were alleged to have made direct misrepresentations, and  
11 taking specifically alleged action directly addressed  
12 towards the plaintiffs, there's no such specific allegations  
13 here or misrepresentations have been made, nor any  
14 particular action directed toward any particular plaintiff  
15 or punitive class member. And where the only alleged  
16 specific alleged activity was that taken by Picower in his  
17 own accounts.

18 I'll turn now, Your Honor, to the fact that we  
19 also say that this -- these activities violate the automatic  
20 stay.

21 The claims here are certainly generalized, all of  
22 the customers. They are generalized, they're duplicative,  
23 and our position is that they violate the automatic stay.

24 Now, we believe that --

25 THE COURT: Could they violate the automatic stay

1 without violating the injunction?

2 MR. MURPHY: Excuse me, Your Honor? They violate  
3 both.

4 THE COURT: Well, but could they violate one  
5 without violating the other? Do I really --

6 MR. MURPHY: No.

7 THE COURT: -- I have to reach --

8 MR. MURPHY: You don't have to reach both. Yes,  
9 you don't have to reach both, Your Honor. To that point  
10 then, Your Honor, I will move along.

11 Just --

12 THE COURT: In other words, there's no difference  
13 at this point?

14 MR. MURPHY: No, I don't think that there is, Your  
15 Honor. I think --

16 THE COURT: If it's a derivative claim, it  
17 violates the automatic stay and it violates the injunction.

18 MR. MURPHY: Exactly. And we say that these  
19 claims are the estate's claims, and they're trying to also  
20 under 362(a)(1) satisfy a claim against the debtor by going  
21 into Picower's. So it's multiple violations.

22 Lastly, Your Honor, I'm going to turn back to the  
23 mandate issue. I argued extensively on Thursday concerning  
24 that. I'm not going to go through it again. I'm going to  
25 adopt that argument.

1 THE COURT: Okay.

2 MR. MURPHY: I'll just highlight a few things from  
3 that. Again, Your Honor --

4 THE COURT: And Mr. Smith will adopt his argument  
5 and we can move on off of that one.

6 MR. MURPHY: What's that?

7 THE COURT: Mr. Smith will adopt his argument,  
8 we'll incorporate it all by reference, and we'll move on.

9 MR. MURPHY: Well, for the benefit of the Goldman  
10 plaintiffs, Your Honor, I'll just very quickly highlight a  
11 few points --

12 THE COURT: Okay.

13 MR. MURPHY: -- I think they're going to address  
14 it.

15 It was a 28-paged decision, Your Honor, from  
16 the --

17 THE COURT: I don't think -- is Goldman making  
18 that argument that this Court lacks jurisdiction?

19 MR. STONE: Your Honor, it's not our position that  
20 the mandate required the case to be filed --

21 THE COURT: Okay. All right. So good, we've  
22 dealt with this.

23 MR. MURPHY: Okay.

24 THE COURT: Thank you.

25 MR. MURPHY: Okay, Your Honor. I'll note lastly

1 that the bankruptcy court expressly retained jurisdiction  
2 over the permanent injunction in any disputes arising or  
3 otherwise relating to it. And as I mentioned, the fraud  
4 actions have not progressed.

5 And by the way, also, they haven't actually  
6 briefed anything like the duplicative derivative issue that  
7 we are fully briefed here on before Your Honor today.

8 THE COURT: Okay.

9 MR. MURPHY: Thank you, Your Honor.

10 MR. STONE: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. STONE: Richard Stone for the Goldman parties.

13 Your Honor, I think you've picked up on many of  
14 the issues that we've addressed in our brief. And before I  
15 go into the substance of my argument, I wanted to make clear  
16 that we have solely one claim in the Goldman case, that's  
17 20(a).

18 20(a) is a provision of federal law that provides  
19 for joint and several liability against the party who does  
20 not make direct misrepresentations, but does not directly  
21 participate in fraud, but who controls or who has the  
22 ability to control the party who does.

23 So the trustee's continuous refrain that we  
24 haven't alleged direct contact, direct misrepresentation  
25 from Picower to underlying investors is irrelevant. That's

1 a 10(b) case. We didn't plead a 10(b) case. BLMIS  
2 committed a 10(b) violation, a series of them. Mr. Madoff  
3 was criminally indicted for that, the SEC brought a case  
4 against BLMIS for that, there's no question.

5 What we are alleging is that Picower, an  
6 individual who was able to control the books and records at  
7 will of a broker dealer --

8 THE COURT: Well, but only within his own account.  
9 There's no -- is there an allegation that he controlled the  
10 books and records -- well, that's a two part question.

11 The first is, am I supposed to look at the  
12 complaint as I asked Mr. Murphy essentially to determine if  
13 there's a controlled --

14 MR. STONE: Mr. Stone, I'm sorry.

15 THE COURT: No, I asked Mr. Murphy --

16 MR. STONE: Oh, yes, I'm sorry.

17 THE COURT: -- am I supposed to look at the  
18 complaint to determine if there's a sufficient control  
19 person claim alleged or do I simply look at the complaint,  
20 which is what Judge Sullivan did holistically to determine  
21 whether it was based upon Picower's withdrawals of funds  
22 from the -- from BLMIS and his manipulation of the accounts  
23 I guess it was kind of a corollary to that. What am I  
24 supposed to be looking for?

25 MR. STONE: Your Honor, as I'm going to address, I

1 don't think Your Honor should do anything. I think Your  
2 Honor is correct that Judge Marra has jurisdiction over this  
3 matter. The case was first --

4 THE COURT: Well, we both do.

5 MR. STONE: Right.

6 THE COURT: The Second Circuit, you know, neither  
7 of you settled it -- cited it --

8 MR. STONE: Right.

9 THE COURT: -- but there's a Baldwin United (ph)  
10 case, we both have jurisdiction --

11 MR. STONE: Right.

12 THE COURT: -- to determine whether the automatic  
13 stay applies and presumably whether the injunction applies.

14 MR. STONE: Correct, Your Honor. But I don't  
15 think this Court has jurisdiction to prevent us, or in any  
16 way enjoin us from proceeding in front of Judge Marra.

17 THE COURT: Well, what if I determine -- Judge  
18 Marra hasn't done anything yet. What if I determine that  
19 your claims violate the permanent injunction? Can't I issue  
20 an injunction to prevent you from prosecuting that?

21 MR. STONE: We don't think so, Your Honor. The  
22 case is pending in front of a federal district court judge  
23 who clearly has jurisdiction over that matter. He has not  
24 issued the stay that has been requested by the Picower  
25 defendants, the parties in interest, who have appeared in

1 Florida, litigated in front of Judge Marra, okay. This is  
2 the trustee appearing here today, not the party in interest  
3 in our case.

4 THE COURT: So you're saying I don't have  
5 jurisdiction --

6 MR. STONE: Correct.

7 THE COURT: -- to issue an injunction to prevent  
8 you from asserting a claim, even though I have jurisdiction  
9 to determine that your activities violate the injunction?

10 MR. STONE: In the same way that if two courts  
11 have equal jurisdiction over a matter, two district courts,  
12 and the first court that has that matter in front of it is  
13 ruling on it. The second court, under rules of comity and  
14 federal jurisdiction defers to the first court.

15 You can't have two courts handling the same matter  
16 at the same time. In this case, the first instance of this  
17 issue being raised vis a vis our proposed, not filed, our  
18 draft amended complaint was to a declaratory action in  
19 federal district court.

20 Federal district courts have exclusive  
21 jurisdiction over federal securities claims. They have  
22 expertise in federal securities claims.

23 THE COURT: But I have jurisdiction to interpret  
24 the injunction.

25 MR. STONE: You do, but so does that judge and

1 that judge took --

2 THE COURT: I'm not arguing --

3 MR. STONE: This is sub judice first.

4 THE COURT: -- with you that -- I grant you, we  
5 both have jurisdiction and the question is who should decide  
6 it.

7 MR. STONE: I don't think that's correct, Your  
8 Honor. I think Judge Esterbrook's (ph) decision that I  
9 cited in 140 B.R. 969 and also In Re Tech Net, 2007 --

10 THE COURT: What about the Second Circuit's  
11 decision in Baldwin United?

12 MR. STONE: I agree that Your Honor has  
13 jurisdiction, okay, but the jurisdiction of the district  
14 court is also pending now. What you would be doing by  
15 ruling is usurping the jurisdiction of the federal district  
16 court which had this matter in front of it first.

17 THE COURT: So you're essentially arguing that the  
18 first in time, first in right principle. The issue was  
19 first presented to Judge Marra and he should decide it.

20 MR. STONE: Right. And also, that as Judge  
21 Esterbrook clearly stated, a bankruptcy court cannot enter  
22 an order even when it has equal jurisdiction to a federal  
23 district court, when that federal district court has sub  
24 judice the same matter, i.e., violation of the stay and the  
25 permanent injunction.



1           They have not rebutted those cases at all, Your  
2           Honor. We think that's black letter law.

3           If I could start from the beginning now. I just  
4           wanted to make clear --

5           THE COURT: Go ahead.

6           MR. STONE: -- that a 20(a) case doesn't require  
7           direct misrepresentations. And I'm going to read from the  
8           complaint the various allegations showing this control  
9           relationship.

10          THE COURT: Okay.

11          MR. STONE: Remember, Your Honor, typical control  
12          person case is where an individual who's a director, or an  
13          outside accountant participates in a fraudulent  
14          misrepresentation or a scheme of fraud, and is then held as  
15          a control person because he had the ability to prevent that  
16          misrepresentation or otherwise.

17          We have much more than that, Your Honor. We have  
18          an individual who day-to-day was dictating the books and  
19          records of a broker dealer. What is a broker dealer?

20          THE COURT: Other than his account, what are the  
21          allegations that he did with respect to --

22          MR. STONE: I'm going to read those, Your Honor.

23          THE COURT: Okay.

24          MR. STONE: The allegations that he controlled the  
25          direct misrepresentations to underlying investors --

1 THE COURT: That sounds conclusory to me.

2 MR. STONE: But, Your Honor, this --

3 THE COURT: What are the facts --

4 MR. STONE: Federal Rule of Civil Procedure 8  
5 applies here, not 9(b).

6 THE COURT: But you still have to allege facts,  
7 don't you?

8 MR. STONE: We have to allege a reasonable basis  
9 for the Court to conclude that we have met the pleading  
10 standard under Rule 8.

11 THE COURT: Okay. So if I have to decide that, it  
12 sounds like I'm deciding whether you pleaded a control  
13 person claim.

14 MR. STONE: Well, we don't think that the Court  
15 should do that. We think the federal court that has  
16 exclusive jurisdiction --

17 THE COURT: So what you're telling me about Rule 8  
18 --

19 MR. STONE: Right.

20 THE COURT: What you're telling me about Rule 8 is  
21 I'm not supposed to review this as a 12(b)(6) motion.

22 MR. STONE: Well, I'm trying to be clear that  
23 that's the rule that would apply, Your Honor, because the  
24 trustee is asking this Court to decide a motion that should  
25 be decided by a district court in Florida.

1 First, Your Honor --

2 THE COURT: Didn't Judge Sullivan refer to Rule 8  
3 or Rule 9(b)?

4 MR. STONE: He did not.

5 THE COURT: All right. So it sounds like those  
6 rules don't apply, and I'm just supposed to make a  
7 determination whether you're simply asserting a dressed-up  
8 derivative claim.

9 MR. STONE: Well, why would Your Honor elect to do  
10 that when there's a federal district court judge -- and by  
11 the way this Metzger case that they cite, that we disagree  
12 about, we both spilled a lot of ink on that, that's fair to  
13 say.

14 THE COURT: Yeah, I read the complaint.

15 MR. STONE: This is Eleventh Circuit case law,  
16 we've got a district court in the Eleventh Circuit. We  
17 think Metzger stands for exactly what we're saying. Two of  
18 the individuals in that case had no direct relationship, and  
19 were only control persons.

20 THE COURT: Yeah, but I recall going through  
21 allegations, Feingold participated in the creation of a  
22 couple of documents that were sent to investors I guess.

23 MR. STONE: It's clear from the decision, Your  
24 Honor, that two of the defendants, and I can indicate who  
25 they were, had no --

1 THE COURT: Basso (ph) and Feingold.

2 MR. STONE: Feingold and Basso were only control  
3 persons, Your Honor.

4 THE COURT: I understand, and there were -- but  
5 there were allegations in the complaint, again I looked at  
6 it with Feingold, not with Basso, that he actually created  
7 certain specific documents that were sent to I guess the  
8 plaintiffs.

9 MR. STONE: In any event, that was not the case  
10 with respect to the Basso defendant, who was solely a  
11 control person, where the Eleventh Circuit held that claim  
12 applies to. And that clearly is our case.

13 But my point is, Your Honor, there's a lot of law  
14 on this, and it's in the Eleventh Circuit where we're  
15 litigating. Why not let that district court handle it?

16 I want to make an initial point, Your Honor, which  
17 we've made I think extensively in our brief. We don't  
18 believe that what we have done violates the stay or could  
19 violate the stay or the permanent injunction. We haven't  
20 sued anyone.

21 THE COURT: I agree, you can ask, I mean, you  
22 can't be violating something, if you're simply asking if  
23 you're violating it.

24 MR. STONE: Correct. So the relief that they  
25 seek, an order finding that we violated the stay in Georgia

1 can't be granted. We haven't violated the stay. And the  
2 case law is clear that we can go to a district court without  
3 fear of violating the stay, without fear of sanctions  
4 against counsel or client, and ask them for this relief, and  
5 that's exactly what we've done.

6 So the relief they're asking for is inappropriate  
7 and inconsistent with the case law that we cited, In Re the  
8 Conference of African Union Church, 184 --

9 THE COURT: Yeah, wasn't that procedurally what  
10 happened though the first time you proceeded in the Southern  
11 District of New York, didn't you ask for a declaration that  
12 what you were doing was not violating the injunction?

13 MR. STONE: We first proceeded in front of Judge  
14 Lifland.

15 THE COURT: Okay. But that was what you asked,  
16 right? And he concluded --

17 MR. STONE: Initially.

18 THE COURT: -- that you were.

19 MR. STONE: Correct.

20 THE COURT: And he concluded you had violated the  
21 stay by doing that, or just violated the injunction?

22 MR. STONE: I believe he concluded we violated the  
23 stay as well.

24 THE COURT: Okay. And Judge Sullivan affirmed  
25 that.

1 MR. STONE: Affirmed on --

2 THE COURT: So obviously there was a live  
3 controversy just by your seeking declaratory relief.

4 MR. STONE: There was no live controversy. We're  
5 seeking new relief in a new case. That case was gone.

6 THE COURT: But my -- what I'm getting from your  
7 argument is you can't be violating the stay or the  
8 injunction by simply asking whether or not you're violating  
9 the stay or the --

10 MR. STONE: Correct.

11 THE COURT: -- injunction. And that sounds to me  
12 exactly what you did before Judge Lifland.

13 MR. STONE: Right. That is what we did.

14 THE COURT: And he --

15 MR. STONE: And that didn't violate the stay by  
16 asking him for that relief --

17 THE COURT: Okay. Now, let's forget about the --

18 MR. STONE: -- we agree, and it doesn't now  
19 either.

20 THE COURT: -- stay. I mean, the basic question  
21 is, whether the action you proposed violates the injunction  
22 and it seemed like that request was sufficient to trigger  
23 the bankruptcy court's and the district court's jurisdiction  
24 to determine that what you're doing violates the injunction.

25 MR. STONE: And had we commenced this action the

1 same way by coming in front of Your Honor first, I agree  
2 with that. But we elected to go to another court that has  
3 jurisdiction and we're entitled to do that. And once we had  
4 done that, and jurisdiction vests there, that is not a  
5 violation of the stay.

6 THE COURT: I agree with you that the district  
7 court has jurisdiction to determine whether the automatic  
8 stay is violated. It doesn't necessarily follow that you're  
9 filing an action in another court that has that jurisdiction  
10 doesn't violate the stay.

11 MR. STONE: I don't -- Your Honor, with all due  
12 respect, we're not asking for relief against the estate.  
13 We're not asking for relief against the Picowers. We're  
14 asking for an order from a district court that we have a  
15 draft complaint, and we're asking that court to determine  
16 that if we were to file that draft complaint, if, would we  
17 violate the stay. I don't understand, and the trustee's  
18 made no argument that that is --

19 THE COURT: It sounds like an advisory opinion.

20 MR. STONE: I mean --

21 THE COURT: Why don't you just file a complaint?

22 MR. STONE: Because we didn't want to violate the  
23 stay or be sanctioned for that, Your Honor.

24 THE COURT: All right.

25 MR. STONE: That's why. But the courts adhere to

1 this process. I mean, I've cited three or four cases where  
2 this is exactly what's being done, and the courts have said  
3 that that doesn't violate the stay.

4 THE COURT: Uh-huh.

5 MR. STONE: Just like it didn't violate the stay  
6 when we came in front of Judge Lifland, which is correct.

7 THE COURT: Yeah, he determined that what you  
8 proposed violated the injunction and that was affirmed.

9 MR. STONE: Right. And Judge Marra may decide the  
10 same, we don't think so, but he has the right to do that.  
11 And if he does decide that it violates the stay, there will  
12 be no case filed, and there will be no violation of the  
13 stay.

14 THE COURT: Has anybody requested a conference  
15 before Judge Marra to determine whether he intends to  
16 proceed or defer?

17 MR. STONE: If I could --

18 THE COURT: Because I have the matter in the Fox  
19 -- the fax (ph) case anyway, so I'm going to decide it.

20 MR. STONE: If I could address that, Your Honor.  
21 We -- what's happened in that action is, initially the  
22 Picowers, not the trustee, responded in Florida voluntarily  
23 seeking to dismiss that action for improper service, and to  
24 stay. The improper service issue is over. They've agreed  
25 in their brief that we have properly served them.



1           So we have a call into Judge Marra's chambers to  
2           the clerk that's working this, asking him to schedule a date  
3           for their answer. Because at this point, they have nothing  
4           pending except the stay, and that doesn't preclude or extend  
5           their time for answering it.

6           THE COURT: But it's a motion for a stay, I mean,  
7           the similar thing occurred with Fox. There's a motion for a  
8           stay, either pending some determination of this court or  
9           pending some -- at that point, some contemplated filing in  
10          this court.

11          So there is some -- there is a live motion before  
12          Judge Marra which raises this issue, right?

13          MR. STONE: Correct, yes.

14          THE COURT: And has that motion been fully  
15          briefed?

16          MR. STONE: We have filed a summary judgment  
17          motion with respect to our claim that it doesn't violate the  
18          automatic stay.

19          THE COURT: So why don't you ask for a conference  
20          on the stay motion before Judge Marra and say, look, this  
21          issue is before the court here, you know, if he's going to  
22          decide it, he's going to decide it. But something good to  
23          know.

24          MR. STONE: We agree with that, Your Honor, and we  
25          did call chambers on Friday and asked for that scheduling,

1 and the clerk was away until this Thursday, and we will  
2 immediately do that on -- by getting back to Florida.

3 So, Your Honor, my first two points, just to  
4 summarize are that one, the Court lacks jurisdiction because  
5 this is pending in the federal district court. And that  
6 there is no violation of the stay, or the permanent  
7 injunction that can be found. What we have done can't  
8 violate the stay there for the relief they seek can't be  
9 ordered by this Court.

10 THE COURT: I disagree with you that I lack  
11 jurisdiction, putting aside the mandate issue. It may be  
12 appropriate for me not to exercise it, just as the Second  
13 Circuit determined in Baldwin United that it was  
14 inappropriate for the district court to exercise its  
15 jurisdiction to determine whether or not the stay was  
16 violated. But I don't think it's a jurisdictional issue.

17 MR. STONE: But doesn't that run the risk of two  
18 courts reaching a decision at approximately the same time  
19 that are inconsistent.

20 THE COURT: That's why the Second Circuit said the  
21 bankruptcy court should decide it first.

22 MR. STONE: Well, that isn't what's occurred here.  
23 The case was first filed in --

24 THE COURT: I understand.

25 MR. STONE: And that was a matter of discretion

1 and the posture of that case.

2 THE COURT: Okay. I understand your argument.

3 MR. STONE: Okay.

4 THE COURT: I'm just disagreeing that it's an  
5 issue of jurisdiction. It's an issue more of deference or  
6 whatever.

7 MR. STONE: Thank you, I understand.

8 Apart from lacking -- apart from my first two  
9 issues, I won't repeat them, I respectfully disagree. We  
10 think that Florida is the right place --

11 THE COURT: People disagree with me all the time.

12 MR. STONE: Okay. We think --

13 THE COURT: Starting before I leave the house, but  
14 go ahead.

15 MR. STONE: There's nothing unusual about this  
16 case proceeding in Florida on this part of the case. The  
17 case was always intended to be in Florida. It was always  
18 venued in Florida. The case that we sought to proceed with  
19 in front of Judge Lifland was venued in Florida. The  
20 attorneys are located in Florida, and it's clear that the  
21 Florida court has jurisdiction.

22 Second, as the case is going to be litigated in  
23 Florida if it proceeds, it's going to be litigated under  
24 Eleventh Circuit federal securities law. Okay. Why not let  
25 the judge who's familiar with that -- there's exclusive

1 federal jurisdiction, bankruptcy courts do not have  
2 jurisdiction to securities matters. Okay.

3 Even under 157 when there's a securities matter in  
4 front of your court --

5 THE COURT: But I know I had a case a long, long  
6 time ago where somebody brought a class action, federal  
7 securities class action, and I certainly had jurisdiction to  
8 determine whether or not the claims were derivative or  
9 direct.

10 MR. STONE: We --

11 THE COURT: And to apply the automatic stay --

12 MR. STONE: We absolutely agree --

13 THE COURT: -- and I think they were derivatives  
14 so.

15 MR. STONE: -- with that, Your Honor.

16 But in a case where we have a complex issue that's  
17 been up to a federal district court once, where there's a  
18 disagreement over whether Eleventh Circuit law applies, it  
19 seems appropriate that a district court judge in that  
20 circuit would apply that law.

21 THE COURT: But on the same vein, we have two  
22 district court decisions, and a Second Circuit decision  
23 which tell us what is a derivative claim and what is a  
24 direct claim in this very case. Doesn't it make sense for  
25 this to be litigated here?

1 MR. STONE: I don't think so, Your Honor, because  
2 Eleventh Circuit law is going to apply that if --

3 THE COURT: If it's a securities law claim.

4 MR. STONE: Right.

5 THE COURT: But I first have to determine whether  
6 it's a derivative claim or not, and isn't that governed by  
7 the Second Circuit's decision on Fox, and Judge Codel and  
8 Judge Sullivan's decisions and Judge Lifland's decisions?

9 MR. STONE: I think it is governed by -- Judge  
10 Codel's decision doesn't deal with 20(a), Judge Sullivan's  
11 decision deals with 20(a).

12 THE COURT: Yeah, but they talk about what a --  
13 okay. They do talk about what is a derivative claim --

14 MR. STONE: Correct.

15 THE COURT: -- and what is a direct claim in this  
16 very context.

17 MR. STONE: Right, that's correct. I agree with  
18 that, Your Honor.

19 Okay. I also want to make the point that here,  
20 the Picowers themselves appeared in federal district court  
21 in Florida.

22 THE COURT: What are they supposed to do, you sued  
23 them?

24 MR. STONE: No, they could've come here and asked  
25 for a TRO. That's what happened last time.

1 THE COURT: But that's essentially what the  
2 trustee did because he's contractually obligated.

3 MR. STONE: But the trustee isn't the party in  
4 interest, the Picowers are. This isn't an estate matter  
5 anymore, we're suing the Picowers, who got a general release  
6 from the estate.

7 THE COURT: Well, it is an estate matter if you're  
8 seeking to usurp a claim that belongs to the estate and the  
9 estate settled.

10 MR. STONE: Agreed, Your Honor. But if it's not,  
11 and we are to proceed, then it's not --

12 THE COURT: Well, but that's --

13 MR. STONE: -- and it will be litigated in --

14 THE COURT: -- what has to be decided whether or  
15 not --

16 MR. STONE: I agree, okay.

17 THE COURT: -- you -- I agree with you that if  
18 you're not usurping an estate claim, then it will be  
19 litigated in Florida.

20 MR. STONE: Okay. What I want to do now, Your  
21 Honor, is walk through the complaint because if there's  
22 substance on the issue, and address the points that were  
23 raised by Judge Sullivan.

24 And again, this is a 20(a) case, not a 10(b) case.  
25 So what Judge Sullivan said was, how he -- why he criticized

1 our prior complaint was that he said, control consisted  
2 solely of the Picower defendants, directing fictitious  
3 trades in and withdrawing proceeds from their accounts.

4 So doing the trades and withdrawing proceeds.  
5 That's what he said we alleged only. Stated it differently,  
6 all the book entries and fraudulent trading records refer to  
7 nothing more than fictitious records BLMIS made for the  
8 Picower defendants themselves.

9 Okay. So let's look at the allegations and see if  
10 we've gone beyond that. What he's said we should have done  
11 and could have done, or maybe could have done, was make an  
12 allegation that the Picower defendants directed the creation  
13 or dissemination of false statements to other BLMIS  
14 customers. That would've been sufficient in his mind.

15 As to fraud to other customers, the complaints are  
16 completely silent about the Picower defendant's involvement.  
17 Okay.

18 So let's go through the complaint and see what  
19 we've done vis a vis that.

20 First, paragraph 71.

21 THE COURT: Wait, I'm looking at your complaint, I  
22 have it. 71?

23 MR. STONE: This is in the Golden complaint draft.

24 THE COURT: Just give me a minute. Okay.

25 MR. STONE: Picower's ability to direct the

1 creation and dissemination of false and misleading trade  
2 documents which he knew would be incorporated in financial  
3 disclosures made by BLMIS, a highly regulated broker and  
4 investment advisor shows that Picower exercised, directed,  
5 and direct control over the day-to-day operations of BLMIS  
6 and specifically over trading activity that constituted a  
7 violation of the securities laws.

8 THE COURT: Sounds pretty conclusory to me.

9 MR. STONE: Your Honor, again, you're -- what's  
10 the pleading standard that Your Honor would like to apply  
11 here? We have to give a plain and simple statement, okay,  
12 we haven't had any chance to take discovery. Yes, the case  
13 has gone on for years, but we haven't gotten one bit of  
14 discovery.

15 THE COURT: But you don't get to discovery unless  
16 you plead facts sufficient, in essence, to survive a motion  
17 to dismiss.

18 MR. STONE: Okay.

19 THE COURT: I realize this isn't a motion to  
20 dismiss.

21 MR. STONE: Right. I'm going to continue here.  
22 The volume, pattern, and practice of Picower's control of  
23 the defendant's documentation of underlying transactions,  
24 including the direction of false reporting of customer  
25 assets and returns in monthly statements to plaintiffs, as



1 well as Picower's direct or indirect control over the  
2 benefits of the Ponzi scheme establish control.

3 We are alleging that he had control over the  
4 reporting of customer assets in their monthly statements.

5 THE COURT: Well, no, I understand that's what  
6 you're alleging. But the argument that's being made is  
7 those are conclusory allegations, and I should ignore them,  
8 and for the purposes of determining whether it's a  
9 derivative claim or a direct claim.

10 MR. STONE: Under what theory would the Court  
11 ignore them?

12 THE COURT: Well, they're conclusory allegations.

13 MR. STONE: But what the pleading standard --  
14 that's not the pleading standard that we think should apply.  
15 We think rule -- Federal Rule of Civil -- what Your Honor is  
16 doing I think is actually applying Federal Rule of Civil  
17 Procedure to this complaint.

18 THE COURT: Well but that's --

19 MR. STONE: You're reviewing it as if it were a  
20 motion to dismiss.

21 THE COURT: That's the issue I raised with counsel  
22 for Mr. --

23 MR. STONE: And I don't think that's appropriate.  
24 I don't -- again, I don't think the Court has the ability to  
25 determine that, that's a motion to dismiss that should be

1 directed to the district court.

2 If I could continue. Paragraph 90, Picower  
3 actively communicated and agreed with Madoff and other BLMIS  
4 personnel to perpetuate the fraud. Picower had a close  
5 relationship with Madoff and BLMIS, and directly, indirectly  
6 ensured that Madoff and BLMIS concealed the fraud from other  
7 customers.

8 Picower directly or indirectly induced BLMIS'  
9 misleading statements to others. These misrepresentations  
10 induced BLMIS customers to pay BLMIS for non-existent  
11 securities. That's a classic statement of control personal  
12 liability. I controlled an entity that made misstatements  
13 that I directed them to make.

14 Paragraph 91. Picower intimate knowledge and  
15 involvement in the operations, records, recordkeeping and  
16 financial management of BLMIS. That's pretty specific, Your  
17 Honor.

18 Picower directly or indirectly induced the  
19 material misrepresentations and omissions giving rise to the  
20 securities violations alleged herein. Those would be BLMIS'  
21 misrepresentations to the underlying customers.

22 THE COURT: You know I understand, Mr. Stone, what  
23 you're arguing. My question is not whether you're asserting  
24 what purports to be direct claims. My question is in  
25 reviewing the complaint, what standard am I supposed to

1 apply. And am I really bound by whether or not you've pled  
2 a sufficient controlled person claim, or am I simply looking  
3 at the complaint as Judge Sullivan did, without regard to  
4 Rule 8(a), and looking at the well-pleaded facts, I guess,  
5 and I know it sounds like a motion to dismiss when I use a  
6 phrase like that, and deciding whether you're just trying to  
7 circumvent the trustee's derivative claim.

8 MR. STONE: But, Your Honor, we're not  
9 circumventing it. What Judge Sullivan was concerned about  
10 was that the allegations simply related to documents  
11 concerning Mr. Picower's fraudulent accounts, that there was  
12 no connection between that and BLMIS' misrepresentations to  
13 the customers. Not that we made direct misrepresentations,  
14 but we didn't connect how those false book entries amounted  
15 to misrepresentations to customers and we have.

16 What we've said is, they are incorporated in the  
17 monthly statements made to customers. Picower had the  
18 incentive to hide the fort or he would've gotten too, and  
19 gone to jail just like Mr. Madoff.

20 And the way that he did that was by directing them  
21 to make false misrepresentations in the monthly statements  
22 of the assets that were in their account. That's a massive  
23 amount of control.

24 THE COURT: So you're saying, your complaint  
25 alleges that Picower directed Madoff to make false

1 statements in the other customers' accounts?

2 MR. STONE: Correct.

3 THE COURT: Where do you allege that?

4 MR. STONE: I read it to you, Your Honor.

5 THE COURT: That's not what I heard.

6 MR. STONE: Okay. As a result of --

7 THE COURT: I heard generalized language that he  
8 directly or indirectly caused BLMIS.

9 MR. STONE: Paragraph 67, as a result of Picower's  
10 control, he caused BLMIS to present plaintiffs with false  
11 and misleading information; i.e., inflated account values,  
12 in order to induce those investors to remain invested in  
13 BLMIS, and to continue to attract new investments in BLMIS.  
14 If plaintiffs had been provided with accurate information,  
15 they would've attempted to protect the value, and the Ponzi  
16 scheme would have collapsed.

17 THE COURT: Does your complaint allege or proposed  
18 complaint allege what he did in order to cause BLMIS to  
19 issue these false statements?

20 MR. STONE: What it says is that he controlled the  
21 process.

22 THE COURT: I understand the word control, but  
23 does it say what he did to control the process?

24 MR. STONE: Yes. He had phony account records  
25 created that masked his theft of money.

1 THE COURT: That sounds like what the Second  
2 Circuit and Judge Sullivan were warning about in the last  
3 complaint, that was based on the manipulation of his records  
4 so that he could withdraw money from BLMIS.

5 MR. STONE: But it is not. It is based on the  
6 manipulation of the records to the customers. And, Your  
7 Honor, there's a slippery slope here. You agree I think,  
8 Your Honor, that the same facts can lead to an estate claim  
9 and a securities claim. That's quite common. Okay.

10 I think that's what Your Honor is saying. Yes,  
11 the fact that he stole money and had phony trades parked in  
12 his account and had the records gerrymandered to reflect  
13 that, okay. Did lead to the fact that there was a necessity  
14 to do that in customer accounts also to protect the fraud.  
15 So what? So what? Every fraud has to be covered up, and  
16 it's the cover-up that may lead to misrepresentations to  
17 other parties. That's the nature of securities fraud.

18 I commit a theft at a company and I lie about it.  
19 That's the securities fraud. So the two acts lead to two  
20 things. One, conversion or fraudulent conveyance; and two,  
21 misrepresentations. And that's what we're alleging here. I  
22 don't think it could be more direct.

23 He caused BLMIS to present plaintiffs with false  
24 and misleading information; i.e., inflated account values.  
25 I don't think we have to allege that he physically wrote

1       them, or the exact process by which we do. We know that he  
2       had an assistant who made phone calls to the BLMIS trading  
3       desk, and had them rearrange trading records at will.

4               THE COURT: Go ahead.

5               MR. STONE: A broker dealer consists of two  
6       things, securities and cash. There's a master ledger of all  
7       the securities' positions, and there's a master ledger of  
8       the cash. The amount of securities' positions in customer  
9       accounts has to add up to what you actually own at the  
10      broker dealer.

11              A misrepresentation in account A that you own X  
12      has to result in a misrepresentation of account B, telling  
13      them that they own X when they don't own X. It's a  
14      necessity. So by directing --

15              THE COURT: Isn't that a secondary effect of his  
16      withdrawing this money from the estate?

17              MR. STONE: It's not a secondary effect. It's an  
18      effect that we allege he knew about and directed. It's not  
19      a natural effect, they could've told the truth.

20              THE COURT: I guess we wouldn't be here today.

21              MR. STONE: Correct.

22              THE COURT: Okay.

23              MR. STONE: They could have made a different  
24      misrepresentation. They could've gotten a loan from a third  
25      party to make up for the losses and lied to that guy. There

1 are lots of ways to hide a fraud. They chose to hide the  
2 fraud by lying to prospective investors and current  
3 investors, and that's what Picower directed.

4 And there's no question he had the ability to  
5 manipulate the records of the company. I don't think we  
6 can, and I litigated many control person case, but I've  
7 never had one where we were so micro on the issue. Control  
8 is a general theory, do you have the ability to control  
9 what's going on at the company.

10 Yes, he had the ability to control the cash flow  
11 in and out at will. He had the ability to control the books  
12 and records. He had the ability to hide his fraud by  
13 directing Picower, by directing Madoff and the Madoff  
14 employees to lie to customers about what was in their  
15 accounts, to protect the fraud. That's massive control.

16 More than I -- in all honesty, Your Honor, more  
17 than I've ever seen in a control person case. Again, a  
18 typical control person case is where an accountant  
19 participates in a single misrepresentation that's made by a  
20 third party in his role in participating in that is  
21 sufficient to impose control personal liability, Your Honor.

22 Picower was using Madoff to steal money at the  
23 expense of the underlying customers. There's no doubt about  
24 it. That was his scheme.

25 Can I tell you --

1 THE COURT: Does that mean that anybody who got a  
2 distribution in this case with knowledge of the Ponzi scheme  
3 is a control person, because they would have to know that  
4 Madoff would have to steal the money from somebody else?

5 MR. STONE: No. Because those people didn't  
6 necessarily have the ability, I don't know.

7 THE COURT: So the knowledge --

8 MR. STONE: And to my knowledge, they didn't have  
9 the ability to control the trading records.

10 THE COURT: So the mere knowledge that you're  
11 creating a situation where you know that somebody has to  
12 steal money in order to pay you, steal money from others,  
13 doesn't create control personal liability?

14 MR. STONE: Not unless, I believe, Your Honor,  
15 you're controlling the firm. In this case, we have control  
16 through the control of the records.

17 Again, this isn't a manufacturing company, we're  
18 making a simple misrepresentation about what we produced or  
19 our venue. This is a broker dealer that has stock and  
20 money. He's lying about the money and he's lying about the  
21 stock, and he's directing them to transmit those lies in  
22 thousands of monthly statements to underlying customers.  
23 That's our theory of the case.

24 How did that happen? It happened through  
25 communications. Through e-mails, through phone calls, we



1 have some of those phone calls and some of those e-mails.  
2 We don't have all of them, because we haven't gotten  
3 discovery.

4 THE COURT: All I'm looking at is the complaint at  
5 this point.

6 MR. STONE: I understand that.

7 THE COURT: All right.

8 MR. STONE: Okay. So if I could just -- I think  
9 I've read enough of the allegations from the complaint, Your  
10 Honor. I just wanted to read one more, which is paragraph  
11 77 which I think is sort of the summary paragraph.

12 The volume pattern and practice of Picower's  
13 control over fraudulent documentation of underlying of  
14 transactions at BLMIS, including the direction of false  
15 reporting of customer assets and returns in monthly  
16 statements to plaintiffs, as well as his direct and control  
17 over the benefits of the Ponzi scheme establish control.

18 So we have made the connection, and I believe  
19 sufficient to survive a Federal Rules of Civil Procedure 8  
20 motion, that he directed the misrepresentations that were  
21 made to customers to hide his theft.

22 And we don't think that this Court should go  
23 anywhere beyond that, doing any other analysis. There's  
24 been no briefing of the pleading standard as if this was a  
25 motion to dismiss or case law on control person liability.

1 I think that's way beyond the scope of where we are here  
2 today, and should be handled by the district court.

3 Again, Your Honor, we're not alleging a 10(b)  
4 case. We're alleging a control person case. That's my  
5 argument. Do you have any other questions?

6 THE COURT: No, thank you very much.

7 MR. STONE: Thank you.

8 MR. SMITH: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. SMITH: Peter Smith for the Fox plaintiffs.  
11 I'm going to try not to cover old ground, and surely not to  
12 undo anything, any good work that Mr. Stone has done. I  
13 incorporate by reference the mandate arguments I made last  
14 week.

15 THE COURT: Thank you.

16 MR. SMITH: But having said that, I just would  
17 like to speak about the mandate briefly, which is only  
18 lawyers could make such a mess of this.

19 You know --

20 THE COURT: You're a lawyer, right?

21 MR. SMITH: Yeah, but I didn't create this mess.  
22 The Fox plaintiffs didn't have a 20(a) claim, so whatever  
23 the Second Circuit said, it didn't apply to the claim that  
24 they've brought now.

25 THE COURT: But I'm supposed to disregard labels

1       anyway, right?

2               MR. SMITH: You sure should.

3               THE COURT: Okay.

4               MR. SMITH: They filed their complaint where they  
5       were told to. And why shouldn't we assume that the Second  
6       Circuit included that language in the most important part of  
7       its decision to avoid this very mess.

8               THE COURT: Let me cut through this. We've been  
9       through this last week.

10              MR. SMITH: Yeah.

11              THE COURT: You went to the Florida court in the  
12       first instance, which was the phrase from the Second  
13       Circuit.

14              MR. SMITH: Correct.

15              THE COURT: And Judge Weiscamp essentially said he  
16       was going to defer to this court. So we're beyond that. So  
17       let's move on.

18              MR. SMITH: And now it's your decision.

19              THE COURT: Right.

20              MR. SMITH: And our argument is, as you said, it's  
21       not a matter of jurisdiction, it's discretion, and you  
22       should do what the Second Circuit mandated and let them  
23       actually decide it, not simply --

24              THE COURT: He has decided it. You made the  
25       argument and he deferred.

1 MR. SMITH: Okay. I don't believe he's decided  
2 anything. He's --

3 THE COURT: Well, all right, so we differ on that.  
4 But we heard -- you know, we went through this last week.

5 MR. SMITH: The trustee began by saying, that this  
6 is not a 12(b)(6) motion, and we all agree it isn't. But I  
7 feel like we're dealing with a summary judgment motion at  
8 times, because he's saying well, there's not enough facts,  
9 and it's not enough that the allegation is based on  
10 something Madoff said. Well, that's neither -- that's not  
11 where we're here to decide. It wouldn't be relevant to --  
12 even a 12(b)(6), maybe a trial, maybe a summary judgment, we  
13 can't help the fact that the primary witnesses to what we've  
14 alleged happened are Madoff and Mr. Picower who was found  
15 dead shortly after Madoff confessed.

16 The last I checked, even convicted felons are  
17 allowed to testify under oath. Whether he's credible or not  
18 is not to be decided today. He -- the allegations in this  
19 complaint are based on things he said. We don't say  
20 anywhere in our complaint that they're based on a book.

21 So I don't know where that comes from. This is  
22 litigation by guesswork I suppose. It says according to  
23 Madoff. And the allegations cannot be discounted simply  
24 because he's the source.

25 The trustee says he compared all the allegations

1 from the prior complaints to his original complaint to the  
2 ones that are before the Florida court on the motion to  
3 amend, and wherever the Goldman one ends up being.

4 Notably, among that -- in that chart, ten pages,  
5 at the back of his brief, he doesn't focus on the ones that  
6 matter. And when he filed his motion, he didn't focus on  
7 the ones that matter. And when we called him out on it, in  
8 our opposition, he still hasn't directly addressed them.

9 And they're the allegations in paragraphs 46, 49,  
10 and 115 of the Fox's complaint. 46 says that Picower  
11 actively engaged in soliciting or encouraging I think is the  
12 word customers to invest with Madoff.

13 Notwithstanding that allegation, clear a day in  
14 the complaint, the trustee said in his papers, in his reply,  
15 and again here today that we haven't alleged anything that  
16 has to do with something other than Picower's account. How  
17 can you say that? How can you stand here and say that?  
18 It's so obvious he knows it's there, and he's been choosing  
19 to ignore it. It can't be ignored. It's in there. They  
20 have to deal with it.

21 It also shows that there were misrepresentations.  
22 You can't actively encourage someone to invest in Madoff  
23 when you're Picower. Because Picower knew what was going  
24 on. We know that. The trustee's alleged that Picower knew  
25 what was going on.

1           So if I know what's going on, which is Madoff's  
2           going to take your money and give it to me, or give it to  
3           someone else, I'm encouraging you to invest in it, you're  
4           lying to them. That's a misrepresentation. You can't have  
5           it any other way.

6           THE COURT: What's the misrepresentation?

7           MR. SMITH: Presumably that this is a good idea.  
8           You can't encourage someone --

9           THE COURT: There's no allegation that he told  
10          anybody that.

11          MR. SMITH: If the allegation --

12          THE COURT: If you're saying they inferred that,  
13          assuming they knew, if they inferred it from the fact that  
14          he was withdrawing a lot of funds. How do they know what  
15          Picower was doing?

16          MR. SMITH: I mean, who know what Picower was  
17          doing?

18          THE COURT: The investors.

19          MR. SMITH: I don't know that they did. The  
20          allegation is that he encouraged them. You can't --  
21          encourage means go ahead, give him your money. He knew what  
22          Madoff was going to do with the money, he was going to steal  
23          it. So that's a misrepresentation. You can't -- he didn't  
24          tell them the truth, that's for sure. We talked about that  
25          a second ago.

1 It also -- the point also allegation in paragraph  
2 49 that he told Madoff to encourage more people to get -- to  
3 expand his base, so there'd be more people to put money into  
4 the BLMIS. That has nothing to do with Picower's account.  
5 Right? And that's what the Second Circuit --

6 THE COURT: Why would he tell Madoff --

7 MR. SMITH: To find more --

8 THE COURT: -- to get more customers unless it was  
9 to make his withdrawals?

10 MR. SMITH: Well, whether that was the reason does  
11 not --

12 THE COURT: Why else would it --

13 MR. SMITH: Well, everything has to do with --

14 THE COURT: Well, it's got to be plausible, isn't  
15 it?

16 MR. SMITH: It is plausible.

17 THE COURT: I mean, that's a 12(b)(6) standard,  
18 but it's got to be plausible.

19 MR. SMITH: It is a 12(b)(6), and really all we  
20 had to do to satisfy the Second Circuit was, make  
21 allegations that are not duplicative or derivative of the  
22 trustee's claims.

23 The trustee has no claims like that. The trustee  
24 can't recover any damages for things like that.

25 As to the control person allegations, I adopt the

1 arguments of Mr. Stone, and I would point to paragraph 115  
2 of our second amended complaint, which is very similar to  
3 the allegations that Mr. Stone highlighted in their  
4 complaint, which is that Madoff -- I'm sorry, that Picower  
5 not just had the ability to control, but did control aspects  
6 of Madoff's operations from account statements to  
7 everything.

8 This is not -- I know you don't want to go there,  
9 but if you're going to look at this and notwithstanding the  
10 mandate, then there's nothing for the Court to decide about  
11 the legal sufficiency of these claims. It's much more  
12 narrower than that.

13 The corridor for the Court on this application is  
14 simply to look at the complaint, and see whether these  
15 allegations duplicate something that the trustee has already  
16 brought. And they're clearly different.

17 They are not the same thing we pled before. Mr.  
18 Murphy said, oh, they've had several chances to do this.  
19 No, this is the Fox plaintiffs' second chance, not several.  
20 They filed a complaint, it went all the way up to the Second  
21 Circuit. The Second Circuit said --

22 THE COURT: Well, I don't have before me a motion  
23 to leave to replead, so.

24 MR. SMITH: I'm sorry?

25 THE COURT: I don't have before me a motion to



1 leave to replead so --

2 MR. SMITH: Right.

3 THE COURT: -- it doesn't really matter how many  
4 times you've pled this.

5 MR. SMITH: Correct, okay.

6 The motion would be premature in any event, an  
7 application for leave to --

8 THE COURT: When would it be timely?

9 MR. SMITH: I suppose if the --

10 THE COURT: After the district court ruled in  
11 Florida?

12 MR. SMITH: Yeah, I suppose it would be then.

13 THE COURT: Then it's timely?

14 MR. SMITH: Well, I --

15 THE COURT: After the district court has decided  
16 this issue?

17 MR. SMITH: I'm sorry?

18 THE COURT: After the district court has decided  
19 the issue?

20 MR. SMITH: That's right.

21 THE COURT: How could I -- how could they then  
22 bring a motion here if the district court in Florida decided  
23 the same issue?

24 MR. SMITH: Well, they could certainly intervene  
25 down there, and put in --

1 THE COURT: But after they've decided --

2 MR. SMITH: No, they could put in their two cents  
3 just as the Picowers came up here the other day and filed a  
4 motion to --

5 THE COURT: I agree with you they could intervene.

6 MR. SMITH: Right.

7 THE COURT: But why couldn't they also make a  
8 motion here to file an adversary proceeding?

9 MR. SMITH: We're back to the mandate.

10 THE COURT: Okay.

11 MR. SMITH: It's -- I also feel like we've lost  
12 sight on whose burden this is. You know, the Second Circuit  
13 didn't say that we have a burden to go out and do thus and  
14 such. We filed a complaint, there it is. It's the  
15 trustee's burden to show how it is duplicative.

16 And so far all he has said, talk about conclusory  
17 obligations, ah, it's the same old stuff all over again. He  
18 doesn't address in his oral argument or in his reply, the  
19 very allegations that we say make it different.

20 We put those in there in direct response to what  
21 the Second Circuit told us to do. He hasn't met his burden.

22 I would add further that we don't just have a 28  
23 claim. We have RICO claims, we have other common law  
24 claims.

25 THE COURT: But they're all based on the same

1 facts, aren't they?

2 MR. SMITH: Well, he hasn't addressed them at all.  
3 He has not said --

4 THE COURT: Well, are they based on the same  
5 facts?

6 MR. SMITH: Absolutely not. They're based on the  
7 facts in 46, among other things, on the allegations --

8 THE COURT: I'm saying, aren't your RICO claims  
9 and your prima facie court claim based on the same facts as  
10 your, essentially your control person claim?

11 MR. SMITH: The -- not all of them. I mean, you  
12 don't have to show that he --

13 THE COURT: I'm talking about the elements.

14 MR. SMITH: Yeah, I know, but --

15 THE COURT: Aren't they based on the same factual  
16 matter?

17 MR. SMITH: Sure. The facts are the facts.

18 THE COURT: That Picower induced --

19 MR. SMITH: Right.

20 THE COURT: -- Madoff to go out and get more  
21 customers and also participated in the preparation of false  
22 statements.

23 MR. SMITH: I see what you mean, yes. But whether  
24 he --

25 THE COURT: So if those claims are derivative,

1 then all the other claims have to be derivative.

2 MR. SMITH: Right. But remember most of the time  
3 that was spent so far, before I got up here, was talking  
4 about whether Your Honor should be deciding whether the  
5 control was sufficiently pled or not, right?

6 THE COURT: Right.

7 MR. SMITH: That has nothing to do whether -- with  
8 whether we've alleged an aiding and abetting a fiduciary  
9 duty claim. We don't have to allege any control for that.  
10 And the trustee hasn't even spoken to it.

11 THE COURT: But you have to at least have the  
12 Second Circuit law, you would have to allege -- knowledge  
13 which you've alleged, but actual substantial assistance.

14 MR. SMITH: Correct. But my point is just this,  
15 even if you find for whatever standard you apply --

16 THE COURT: And I doubt under the Second Circuit's  
17 recent case in Refco that you would survive a motion to  
18 dismiss that claim.

19 MR. SMITH: And if this were a motion to dismiss,  
20 that might matter, but it doesn't. The point -- the reason  
21 I raise it is, even if Your Honor, no matter what standard  
22 you decide to apply on that control person claim, you could  
23 find that's no good, I don't think it's good enough, Justice  
24 Sullivan would've said it's no good. Guess what, we still  
25 have the aiding and abetting claims.

1 THE COURT: I guess what you're saying, and this  
2 is not a rhetorical question, you're saying, all I do is I  
3 look at your complaint, if the underlying claim is a direct  
4 -- what looks like a direct claim, a control person claim  
5 let's say, that that's the end of the inquiry and then it  
6 goes back to Florida to decide whether or not it adequately  
7 states a claim.

8 MR. SMITH: That's what the injunction says. It  
9 doesn't say anything --

10 THE COURT: Well --

11 MR. SMITH: The injunction doesn't say that the  
12 trustee will use his best efforts to prevent former BLMIS  
13 customers from filing lousy insufficient claims against the  
14 Picowers. It doesn't say that. It says he's only to use  
15 his best efforts to stop people from filing claims that are  
16 derivative or duplicative of the trustee's claims.

17 He seems to be coming in here and you can tell by  
18 the -- I mean, why is he talking about the sufficiency of  
19 the claims? It's only because he realizes that these things  
20 are not duplicative. If they were duplicative or  
21 derivative, he wouldn't bother telling you for pages and  
22 pages in his brief that they're no good, that they don't  
23 allege enough evidence, as if that's what matters on this  
24 motion. That wouldn't even matter on a 12(b)(6).

25 THE COURT: Well, the Second Circuit used the

1 phrase particularized allegations. So that suggests it's  
2 got to be something more than conclusory, doesn't it?

3 MR. SMITH: And I would suggest yes, but  
4 conclusory in this context would be something like if a  
5 plaintiff came up and said, you know, to avoid the  
6 derivative and duplicative injunction said, Picower has  
7 injured me in ways that are totally different from the  
8 claims that the trustee sued him for. That would be  
9 conclusory.

10 This -- you know, I don't know how long our  
11 complaint is, it goes through all these elements, that's not  
12 conclusory. That's the best we can do now. I mean, how  
13 often do you -- what more facts do we need? Do we actually  
14 -- someone has actually communicated with the primary  
15 fraudster, the other one is dead.

16 We've got a motion, a cross-motion pending in  
17 Florida for expedited discovery to take Madoff's deposition,  
18 and to take the deposition of a representative of the  
19 Picower's. Until we get that, at least a ruling on that,  
20 how can we be criticized for not providing more details?

21 I mean, it's not as if the evidence of this  
22 conspiracy and this fraud is out there for everyone to  
23 allege with more particularity than we have. We've done the  
24 best we can. This can't be conclusory.

25 Again, Your Honor has a narrow role here, more

1 narrow I submit than a 12(b)(6), and that is, just take a  
2 look at this complaint, and is it derivative, is it  
3 duplicative. It's not.

4 It's different from the first one that we filed,  
5 and therefore, your inquiry is done.

6 THE COURT: Thank you. Yes?

7 MS. HARRIS: Your Honor, may I be heard?

8 THE COURT: On -- who are you and on what?

9 MS. HARRIS: I'm Marcy Harris, Schulte Roth &  
10 Zabel, counsel to the Picower parties.

11 THE COURT: Well, you're not a party to this  
12 action.

13 MS. HARRIS: We've moved for intervention.

14 THE COURT: But that's a motion a week off.

15 MS. HARRIS: We are -- our interest is directly at  
16 issue here.

17 THE COURT: That's certainly relevant to your  
18 intervention motion.

19 MS. HARRIS: We are litigating in the Florida  
20 courts, and there were statements made about the status of  
21 the --

22 THE COURT: All right. I'm happy to hear about  
23 the status of the Florida proceeding, because you're  
24 involved in that, but in terms of the merits of the  
25 trustee's motion, the trustee is the one who will make that

1 argument.

2 MS. HARRIS: Okay. I want to be clear that's what  
3 been litigated in Florida is not this issue, whether the  
4 trustee's claims or whether the claims in the new complaints  
5 are derivative or duplicative.

6 THE COURT: No, I understand that.

7 MS. HARRIS: There has been a motion before Judge  
8 Marra that's fully briefed that he hasn't decided yet, it  
9 addresses --

10 THE COURT: Is that for the stay? That's for the  
11 stay?

12 MS. HARRIS: For the stay and service issues.  
13 That's it. We've never briefed the issue. Picowers have  
14 never briefed the issue addressed to the duplicative or  
15 derivative nature of the claims.

16 THE COURT: Is there a date for the -- the  
17 response to your motion?

18 MS. HARRIS: The agreement that we had reached  
19 with counsel was that we wouldn't have to respond and put in  
20 an answer or move to dismiss until this ruling, this Court  
21 had determined --

22 THE COURT: It sounds like a chicken and egg  
23 problem.

24 MS. HARRIS: Well, the first I heard sitting here  
25 that there was a conference call to the Court last Friday to



1 set up a schedule.

2 THE COURT: I got it.

3 MS. HARRIS: I don't know. Right now, I can tell  
4 you we're not aware of any briefing schedule with respect to  
5 Judge Marra, and on the Fox side, Weiscamp that the  
6 threshold issues have been stayed, there's been no briefing  
7 again in that court on the duplicate or derivative issue.

8 THE COURT: Okay. Thank you.

9 MS. HARRIS: Thank you.

10 MR. MURPHY: Your Honor, I'm just going to limit  
11 my comments to addressing some of the statements that were  
12 made by my colleagues, Mr. Stone and Mr. Smith.

13 Absolutely, you can indeed, Your Honor, issue an  
14 injunction when it's duplicative of estate claims. The  
15 Second Circuit confirmed it can. We're also not looking to  
16 enjoin courts here, we're looking to enjoin parties.

17 With respect to Metzger versus Feingold, Basso,  
18 the other party here was an officer and director, and an  
19 owner of one of the accounts where all the money went. So  
20 again, that's substantively different than what we have  
21 here.

22 With respect to our timing, whether it's too  
23 early, too late, kind of in a whipsaw position, I think the  
24 Court recognized it. We're not going to wait until a  
25 Florida district court enters something that's affecting us

1 here. We don't want to be too late.

2 We are not a party to anything down in Florida,  
3 and that's why we are here. We are here where we belong  
4 before Your Honor.

5 With respect to whether this court or that court  
6 should do it, it is this Court's permanent injunction order.  
7 This Court should decide it. The charter communication  
8 decision is instructive with respect to that.

9 As to where this is better put, they said that  
10 some of the people are down in Florida. The main locust of  
11 activity here is in New York. If they're proposing to  
12 appear in a class action with respect to all the customers,  
13 the only that unites all the customers is New York. All the  
14 fraud took place here.

15 THE COURT: Well, then you should make -- somebody  
16 should make a change of venue motion in Florida. I'm not  
17 sure that that -- those factors really weigh into what court  
18 is supposed to decide the issue.

19 MR. MURPHY: True, that's fair, Your Honor.

20 THE COURT: Because I'm going to sit here, and  
21 Judge Marra is going to sit down there, right?

22 MR. MURPHY: That's true, unless you're going to  
23 go on vacation, Your Honor.

24 THE COURT: It's getting too hot in Florida.

25 MR. MURPHY: With respect to -- I feel that, you

1 know, Judge Sullivan kind of created a road map as to why  
2 they went wrong. But what I feel is that the class action  
3 plaintiffs here simply added the word Picower defendants to  
4 where they fell down before.

5 THE COURT: Well, I think I asked you this before,  
6 and it's not clear to me. In either of the cases, the Fox  
7 case, which went to the Second Circuit, or the Goldman case,  
8 were there allegations in the complaints and those times  
9 that Picower controlled BLMIS?

10 MR. MURPHY: Yes, yes, there are, Your Honor. And  
11 let me just address that specifically because I know that --

12 THE COURT: Okay.

13 MR. MURPHY: -- specific paragraphs were  
14 identified by Mr. Stone in the complaint.

15 THE COURT: Well, he's looking at the new  
16 complaint, I'm asking about the old complaint. In other  
17 words, I'm asking, has the Second Circuit or Judge Sullivan  
18 directly or indirectly passed on these allegations?

19 MR. MURPHY: Yes, yes. The answer is yes, Your  
20 Honor.

21 I'm not going to reread what Mr. Stone read with  
22 respect to paragraph 71, paragraphs 90, paragraph 91, for  
23 example, in their own amended complaint.

24 THE COURT: Actually, I'm more interested in the  
25 older complaints --

1 MR. MURPHY: Right.

2 THE COURT: -- that have already been before the  
3 Court.

4 MR. MURPHY: Let me direct the Court to the older  
5 complaint them.

6 THE COURT: All right.

7 MR. MURPHY: What I'm suggesting, this is the  
8 complaint that was filed in 2011, Your Honor.

9 THE COURT: Is that in -- which exhibit is that  
10 in? Is it in one of the exhibits?

11 MR. MURPHY: Yes, it is, and I don't know what the  
12 exhibit number is, but we'll -- I'll get that for Your  
13 Honor.

14 THE COURT: This is the Goldman complaint you're  
15 talking about?

16 MR. MURPHY: Yes.

17 THE COURT: Let me see if I can find it, because  
18 it would be helpful if I could.

19 MR. MURPHY: Sure.

20 THE COURT: Do we have the complaints and these  
21 pleadings from the own --

22 MR. MURPHY: Exhibit K to the Murphy declaration,  
23 Your Honor.

24 THE COURT: Okay.

25 MR. MURPHY: And you can turn to --

1 THE COURT: We're just trying to find the papers.

2 (Pause)

3 THE COURT: Maybe if you have another copy of it.

4 MR. MURPHY: We're going to get that for Your  
5 Honor.

6 THE COURT: Yeah. I can't find it, if you have  
7 another one.

8 MR. MURPHY: That's okay, we're going to get it  
9 for Your Honor.

10 (Pause)

11 THE COURT: I have a Goldman -- I'm looking for  
12 the Goldman complaints.

13 MR. MURPHY: This is the original Goldman  
14 complaint.

15 THE COURT: Oh, all right, because I think I may  
16 have found it, but thank you.

17 MR. MURPHY: I'm going to start with paragraph --  
18 this is the entered 12/13/11, Your Honor.

19 I'm going to start with paragraph number 91, if  
20 you want to turn to that.

21 THE COURT: Go ahead.

22 MR. MURPHY: So I'm not going to reread what Mr.  
23 Stone said, but with respect to his specific references to  
24 paragraph number 71, 90 and 91, as purportedly alleging new  
25 control and direction.

1 THE COURT: Uh-huh.

2 MR. MURPHY: I would direct the Court to paragraph  
3 91 of the former Goldman complaint, I will read it. "The  
4 defendants had the power to influence and control, and did,  
5 in fact, directly influence and control the decision-making  
6 at BLMIS, the recordkeeping at BLMIS, and the recording of  
7 securities transactions at BLMIS."

8 I will go down to paragraph 94, "The defendants  
9 either directly or through Picower had direct involvement in  
10 the day-to-day operations, recordkeeping, and financial  
11 management of BLMIS. The defendants had and employed the  
12 power to control and influence actual transactions giving  
13 rise to the securities violations alleged herein."

14 Your Honor, I'm going to quote from Judge Sullivan  
15 where he says whether -- aside from that, Your Honor, this  
16 is -- let me just go back for a second. Those are the same  
17 allegations that they had made previously, which were  
18 rejected by Judge Sullivan and Judge Lifland. And they are  
19 the same, I would submit to you, when you go back and read  
20 paragraph 71, 90 and 91 that Mr. Stone referred to, it's all  
21 the same thing. There's nothing more here than more  
22 inferences and unsupported statements.

23 And he mentioned one other paragraph, paragraph  
24 67, it began -- paragraph 67 of the new complaint starts out  
25 "as a result of Picower's control." But again, I think if I

1 can take you back, Your Honor, to the earlier kind of levels  
2 that I discussed with you, we're starting out with Picower's  
3 control of his own accounts, and his withdrawals of his own  
4 accounts.

5 And then when you get to the bottom, then we start  
6 talking more, far more inferentially. But again, as a  
7 result of Picower's control, this is an inference.

8 I'll read to the Court as to why the Court has the  
9 power.

10 THE COURT: But didn't the earlier complaint plead  
11 that he controlled or had the ability to control the account  
12 statements sent to other investors?

13 MR. MURPHY: I think what they have, Your Honor,  
14 in paragraph number 2 --

15 THE COURT: This is the old complaint?

16 MR. MURPHY: This is the old complaint. "While  
17 Madoff and a few employees operated the Ponzi scheme on a  
18 day-to-day basis, they did so under the direction and  
19 control of the defendants who participated in the fraud for  
20 their own benefit by directing the false -- by directing the  
21 creation of false books and records at BLMIS."

22 THE COURT: In their own accounts though?

23 MR. MURPHY: This is in --

24 THE COURT: In the defendant's BLMIS accounts, but  
25 the allegation now is that they also indirectly or directly

1 controlled the dissemination of false information to other  
2 customers.

3 MR. MURPHY: I would submit to you, Your Honor,  
4 that that -- to the extent that there are anything beyond  
5 what was here, if any, it's conclusory and is not backed up  
6 by any particularized allegations.

7 THE COURT: Okay. So you're saying that I have to  
8 determine -- I realize we're getting back to what we  
9 started. I have to look at the legal sufficiency of the  
10 allegations, as opposed to just saying, well, you know, a  
11 controlled person claim is a direct claim and the Florida  
12 court should determine whether it's legally sufficient.

13 MR. MURPHY: If we're going back, Your Honor, I'll  
14 go back as well. And that is just --

15 THE COURT: Which is what I did on another case  
16 about 20 years ago.

17 MR. MURPHY: I will read you just a quote from  
18 Judge Sullivan in his decision, he says, and this is on --  
19 this is a West Law cite, Your Honor.

20 THE COURT: What page?

21 MR. MURPHY: \*6, 2013 West Law 5511027 \*6.  
22 "Whether the complaints plead a bona fide control person  
23 claim is relevant insofar as it affects whether appellants  
24 have plead a non-derivative claim. Appellants cannot invoke  
25 the posture of this case to shield their complaints from all



1 scrutiny, since the question before this Court is whether  
2 appellants' claims as pleaded in the complaints should be  
3 allowed to proceed, despite the injunction and the automatic  
4 stay."

5 I submit to Your Honor that Judge Sullivan faced  
6 the same issue that you are asking to -- right now, and he  
7 found that it was appropriate to go forward and look at  
8 these from the perspective of determining whether what we  
9 have here is a direct claim that they're alleging that they  
10 have, or whether it's a duplicative claim.

11 And really, Your Honor, this Court has the power  
12 certainly to determine whether something pleaded here is  
13 duplicate and derivative of the trustee's claims.

14 THE COURT: Yeah, but you see if you go to \*9, he  
15 says, "This examination of the Goldman complaints makes  
16 clear that the appellants did not, in fact, claim that the  
17 Picower defendants directed BLMIS to make misrepresentations  
18 above and beyond what was necessary to document the Picower  
19 defendants' false withdrawals."

20 Don't these complaints allege that? I know you  
21 say it's conclusory, but don't these complaints purport to  
22 allege that?

23 MR. MURPHY: Well, yes, Your Honor, I think that  
24 they do purport to do that. And I --

25 THE COURT: So then the next question is, should I

1 decide if they do it sufficiently or should the Florida  
2 court decide if they do it sufficiently?

3 MR. MURPHY: I think that you should decide, Your  
4 Honor, as to whether they're duplicative and derivative.  
5 And I think that you can.

6 I think that what they were presented with here,  
7 what Judge Sullivan looked at was what he saw. He said,  
8 you've just alleged it as to Mr. Picower's transactions in  
9 his own accounts, this is where you failed, you didn't  
10 allege it as to all the other customers.

11 Well, that's what they then did on this complaint,  
12 Your Honor. They went ahead and they added Picower  
13 defendants to everything where they fell short. But you  
14 need more than mere conclusory statements, and more than  
15 assumptions to just make that. You can't just plug in the  
16 missing words to a complaint and make it stand scrutiny.

17 Again, especially in light of the fact that this  
18 is not the first time that we're looking at this. This is  
19 not a brand new complaint here. As I said before, 75  
20 percent of this was already before the prior judges.

21 So we have to look at it in part from that  
22 framework, and we need to benefit from those judges'  
23 analyses and see to what extent you can apply it here.

24 As to -- there was a reference at some point to e-  
25 mails and calls, maybe showing some kind of evidence. I

1 agree with Your Honor, that's not before the Court, it's not  
2 in the complaint. But I will note that that kind of  
3 evidence, if you will, was promised to Judge Sullivan at  
4 oral argument, but that -- it hasn't appeared and it's not  
5 in the complaint, and I will stick with what Your Honor  
6 said, it's not before you.

7 Your Honor, as to paragraph 46 --

8 THE COURT: Of which complaint?

9 MR. MURPHY: Of the Fox Marshall complaint. There  
10 you go, thanks.

11 My colleague Mr. Smith eluded to paragraph 46 as  
12 showing some strength that they've pleaded independent  
13 claims. I would direct the Court, though, to just as a  
14 comparison, paragraph 45 directly above it, talks about very  
15 specific activity.

16 THE COURT: Well, there's no question they're very  
17 specific in terms of --

18 MR. MURPHY: What Picower did.

19 THE COURT: -- what Picower did with his own  
20 accounts.

21 MR. MURPHY: Correct.

22 THE COURT: I don't think anybody is arguing that,  
23 and this is less specific.

24 MR. MURPHY: Okay. So I'm going to -- what  
25 immediately follows then is the very generalized kind of

1 comment. But again, we start off in paragraph number 46 of  
2 the Fox amended complaint with according to Madoff, Picower  
3 knew that in order to generate the enormous paper profits in  
4 their accounts, BLMIS would have to steal money from  
5 customers. According to Madoff, Picower fully and knowingly  
6 participated in the fraud, that BLMIS perpetrated on  
7 customers and actively encouraged people to enter into  
8 investment advisory agreements.

9 Again, these allegations that Picower fully and  
10 knowingly participated in the fraud had been made before  
11 especially by the Goldman plaintiffs. And not necessarily  
12 -- that was rejected.

13 THE COURT: Did Judge Sullivan deal with that?  
14 Well, where were those allegations in the Goldman complaint?

15 MR. MURPHY: They were in, Your Honor, let me just  
16 see. Your Honor, paragraph 55. Paragraph 55 at the bottom,  
17 at the very end, "at all relevant times, Picower and the  
18 Picower defendants knew that the withdrawals could only be  
19 property of other BLMIS customers, including plaintiff and  
20 the other class members."

21 Paragraph 44, "in interviews with author, Diana  
22 Henriques, Madoff stated that Jeffrey Picower knew the  
23 existence of a scheme, and that Jeffrey Picower was taking  
24 fraudulent profits from the BLMIS customer accounts."

25 Again, I would lead the Court back to paragraphs

1 91 and 94 as an example. Again, they were saying, "the  
2 defendants had the power to influence and control and did,  
3 in fact, influence and control the decision-making at BLMIS,  
4 the recordkeeping at BLMIS, and the recording of securities  
5 transactions at BLMIS."

6 With respect to paragraph 46 again, Your Honor, on  
7 the Fox complaint at least, when we talk about according to  
8 Madoff, that he fully participated. Again, the other courts  
9 have seen that allegation before, but specifically  
10 addressing this one paragraph, Mr. Smith eluded to, if you  
11 read the paragraph as a whole, it's merely an additional  
12 inference based on the same allegations that were previously  
13 made regarding Mr. Picower's activities in his own accounts.

14 I've already commented on what I think about Mr.  
15 Madoff's statements.

16 THE COURT: Well, I'm not going to judge -- you  
17 know, I'm not going to judge Mr. Madoff's credibility.

18 MR. MURPHY: Sure.

19 THE COURT: The question is whether they have  
20 alleged a claim.

21 MR. MURPHY: Well, there's absolutely no  
22 specificity here alleged, Your Honor. I mean, there's no  
23 facts provided. Who did he encourage, when, how, there's no  
24 allegation that any of the customers, the plaintiffs here  
25 received any of that encouragement. Nothing.

1 And they purport to represent that they're going  
2 to represent all customers here, and they represent quite a  
3 few, over a couple of hundred even now in other sides of  
4 this case, or at least well over 150.

5 But, you know, if you contrast the two, the  
6 specific and not specific, you see where they're falling  
7 short, but they can't be more specific here, because they  
8 don't have particularization.

9 We're not sure where that information comes from,  
10 by the way, Mr. Smith alleged -- said not sure where it  
11 comes from.

12 THE COURT: I guess that will be the subject of  
13 discovery.

14 MR. MURPHY: Discovery, yeah, and I mean, they  
15 haven't deposed Mr. Madoff yet, so you know.

16 THE COURT: Has he given any depositions?

17 MR. MURPHY: Not that I know of, Your Honor. I  
18 think that's it, Your Honor. If I could just have a moment  
19 with Picower's counsel for --

20 THE COURT: Sure.

21 (Pause)

22 MR. MURPHY: Your Honor, after consulting Mr.  
23 Picower's counsel, I will note that as to the first filed  
24 issue, the trustee was the first filed here. We brought the  
25 complaint. We had alleged that Mr. Picower knew or should

1 have known about the fraud and the activities going on in  
2 those accounts. In Goldman, one in 2011, and Goldman too in  
3 2014.

4 THE COURT: Yeah, but those are different cases.

5 MR. MURPHY: Different cases, right, Your Honor,  
6 those are --

7 THE COURT: The issue you're raising now is  
8 whether the Picower and Fox complaints violate the automatic  
9 stay and the injunction, and that wasn't something that was  
10 raised when you sued Mr. Picower.

11 MR. MURPHY: Fair enough, Your Honor.

12 THE COURT: All right.

13 MR. MURPHY: Thank you.

14 THE COURT: Thank you. I'll reserve decision, no  
15 surreplies. Thank you.

16 (Proceedings concluded at 11:35 AM)

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**CERTIFICATION**

I, Sheila G. Orms, certify that the foregoing is a  
correct transcript from the official electronic sound  
recording of the proceedings in the above-entitled matter.

Dated: May 7, 2014

**Sheila  
Orms**

Digitally signed by Sheila Orms  
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